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No. _____

In the

Supreme Court of the United States

CLAYTON HOSPITALITY GROUP, INC.,
Petitioner,

vs.

ORANGE COUNTY, FLORIDA and EARL K. WOOD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

There is a serious split among the federal circuit courts as to the meaning of the phrase "prompt judicial review" in *Freedman v. Maryland*, 380 U.S. 51 (1965). Several circuits have held that the phrase means only the right to prompt access to the courts. Other circuits hold that the phrase means prompt access to the courts, followed by a speedy judicial resolution of the claim. The question presented by this Petition is:

> Does immediate access to the courts following a denial of a permit for constitutionally protected speech constitute prompt judicial review, as required by *Freedman v. Maryland*, without regard to the length of time allowed for a judicial decision?

PARTIES TO THE PROCEEDING

The Petitioner is Clayton Hospitality Group, Inc., the Plaintiff in the District Court and the Appellant in the Eleventh Circuit. The Respondents are Orange County, Florida and its Tax Collector, Earl K. Wood, Defendants in the District Court and the Appellees in the Circuit Court.

All parties to the proceedings below are parties to this Petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Counsel for the Petitioners informs this Court that Clayton Hospitality Group, Inc. has no parent or subsidiary corporations, and no publicly owned company holds any ownership interest in the corporation.

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit is reproduced at Appendix A to this Petition. The unreported opinion of the United States District Court for the Middle District of Florida is reproduced at Appendix B. The District Court's unreported opinion on rehearing is reproduced at Appendix C.

JURISDICTION

The Court of Appeals entered its judgment and opinion on May 12, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech . . . .

Statutory provisions

Orange County regulates adult entertainment businesses through a comprehensive licensing and regulatory ordinance. The provisions of that Ordinance that are pertinent to this Petition are reproduced as Appendix D.

STATEMENT OF THE CASE

Like many cities and counties across the United States, Orange County, Florida has a broad zoning, licensing and regulatory ordinance applicable to adult entertainment businesses.[1] Included within the ordinance is a provision establishing the procedure for transfer of a license when a business is sold or otherwise acquired by a new operator. The transfer provision requires the new operator to apply to the Orange County Tax Collector. The Tax Collector distributes copies of the application to the Sheriff and to the County's zoning, building, health and fire departments. The Sheriff and the various departments do background checks, examine the zoning for the business and conduct building and records inspections. After those are completed, the Sheriff and each department makes a recommendation to the Tax Collector as to whether the transfer should be approved.

The Code gives the responsibility for making the ultimate decision on whether to approve the transfer to the Tax Collector. In practice, however, the Tax Collector simply "rubber-stamps" the recommendation of each department.[2] The decision of the Tax Collector must be made within 30 days after receiving the application, and the applicant must be notified within 7 days of that

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1 The regulatory ordinance is cited as the Orange County Adult Entertainment Code, and is codified as Chapter 3 of the Orange County Code of Ordinances. The Adult Entertainment Code will be referred to as "the Code" throughout this Petition.

2 In a pre-trial deposition, the manager of the Occupational License Department of the County, the office that issues and transfers licenses, verified that whatever the departments recommend is what her office does, without exception.

decision. If the Tax Collector denies the application, the applicant has 30 days to file a petition for review in the circuit court of Orange County.[3] There is no time limit within which the circuit court must render a decision.[4]

Clayton Hospitality Group, Inc. purchased an adult entertainment business and applied for a license transfer. Citing building violations that Clayton vigorously disputed, the Tax Collector denied the application. In response, Clayton (1) corrected the "deficiencies," (2) re-applied for a transfer, and (3) filed this lawsuit, arguing that the transfer portion of the Code was facially unconstitutional because, *inter alia*, it did not provide prompt judicial review of the denial of the transfer application.[5] Clayton relied on this Court's opinions in *Freedman v. Maryland*, 380 U.S. 51 (1965) and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

The parties filed cross-motions for summary judgment. On July 30, 2002 the District Court granted the motion filed by the County and the Tax Collector, denied Clayton's motion, and dismissed the case.[6] Following *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir.

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3 Florida's circuit courts are trial courts of general jurisdiction, and are the courts that review final decisions of administrative agencies.

4 Clearly, the Code provides prompt access to the courts if a transfer application is denied. It does not provide for prompt judicial review. The Code would be unconstitutional in at least four federal circuits, but it is valid in at least four others, including the Eleventh Circuit.

5 Once the federal lawsuit was filed, the Tax Collector granted the license transfer. This is an established pattern with adult entertainment license transfer applications in the County.

6 Appendix B.

1999), *cert. denied*, 529 U.S. 1020 (2000), the District Court expressly held that the Code provided for prompt judicial review of transfer denials because it allowed an unsuccessful applicant immediate *access* to the courts.

Clayton appealed to the United States Court of Appeals for the Eleventh Circuit, arguing that the transfer procedure lacked any provision for prompt judicial review. As it had done in the District Court, Clayton acknowledged that the panel would be bound by the prior decision in *Boss Capital*, and that the issue had once again been presented in order to preserve it for further review.[7]

On May 12, 2003 the Court of Appeals rendered its decision. The panel held that prompt access to the courts is sufficient to comply with *Freedman*. The panel simply relied on the earlier panel opinion in *Boss Capital*.

REASON FOR GRANTING THE WRIT

This case brings a vexing problem back to the Court. At this point in time, the federal circuits appear to be evenly divided on the issue Clayton brings to this Court. On two previous occasions the Court has tried to resolve the continuing, and growing, conflict among the circuits on what constitutes prompt judicial review.[8] It is of significant constitutional importance that this conflict

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7 This was acknowledged by the Eleventh Circuit panel in fn. 3 of its opinion. App. A, at 9a.

8 The two earlier cases were *City News & Novelty, Inc. v. City of Waukesha*, 121 U.S. 743 (2001) and *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). Since the Court's last attempt in *Thomas*, the Tenth Circuit has ruled on the issue. The circuits now appear to be evenly divided.

be finally resolved, so free speech receives the same protection in one circuit as in another.[9]

This case also gives the Court the opportunity to reaffirm its decision in *FW/PBS* that prompt judicial *review*, not mere access to the courts, is what this Court meant in *Freedman*.

The Eleventh Circuit opinion is in direct conflict with decisions of other circuit courts on the requirement of prompt judicial review mandated by *Freedman v. Maryland*.

Of prime importance to this Court, in meeting its constitutional obligation to the lower courts, is the need to resolve a serious conflict among the circuits on an issue of significant importance: the requirement that a prior restraint of speech provide for prompt judicial review. The circuits are divided as to what "prompt judicial review" means. In addition to the two earlier attempts by the Court to resolve the conflict, another request for resolution is now pending before the Court: *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, Docket No. 02-1609. This case, and *City of Littleton*, present the Court with a perfect opportunity to finally resolve the conflict.

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9 An adult nightclub in Oklahoma (Tenth Circuit) has the right to prompt judicial disposition. Another nightclub, a few miles over the border in Texas (Fifth Circuit), can only count on prompt judicial access. The same is true for a nightclub in Tennessee (Sixth Circuit) and one in adjoining Georgia (Eleventh Circuit). Federal constitutional rights should not depend on state borders.

In 1965, this Court decided *Freedman v. Maryland*, 380 U.S. 51 (1965). The case involved a statute that required movie exhibitors to submit every film to a review board to obtain a license for showing the film in the state. The Court held that whenever the government imposes a prior restraint on free speech through a permit scheme, that scheme must contain three procedural safeguards. One of those safeguards requires prompt judicial review if a license is denied. 380 U.S. at 59. *See also, FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990) (" . . . there must be the possibility of prompt judicial review in the event that the license is erroneously denied . . . ."). In its opinion in *Freedman* the Court made it clear that "prompt judicial review" meant more than access to the courts:

> . . . Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. *See Bantam Books, Inc. v. Sullivan, supra*. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.
>
> *Id.*

Prompt judicial review, as clearly defined in *Freedman*, is no longer required in the First, Fifth, Seventh and Eleventh Circuits. *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Auth.*, 984 F.2d 1319 (1st Cir. 1993); *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (*en banc*), *cert. denied*, 511 U.S. 1085 (1994); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000). It remains a mandatory part of the *Freedman* test in four other circuits. *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995)(en banc), *cert. denied*, 516 U.S. 1010 (1995); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.1995); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998); and *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 311 F.3d 1220 (10th Cir. 2002).

The Court can now resolve the issue. In this case, the District Court, relying exclusively on *Boss Capital*, said that prompt judicial review only meant prompt access to the courts once a permit was denied.[10] The 3-judge panel in the Eleventh Circuit – again bound by the panel decision in *Boss Capital, supra*, said the same.[11]

That puts this case squarely in conflict with the decisions in *11126 Baltimore Boulevard, East Brooks Books, Baby Tam* and *Z.J. Gifts*.

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10 App. B at 19a-20a.

11 App. A at 9a.

CONCLUSION

This Court has twice before attempted to resolve the conflict among the circuits as to what is meant by *Freedman*'s requirement of prompt judicial review. It is time the conflict is settled.

Clayton Hospitality Group, Inc. asks this Court to grant this Petition so the Court can finally settle this matter. In the event the Court grants the Petition in *Z.J. Gifts*, Clayton asks the Court to either consolidate this case with *Z.J. Gifts* or to hold this case in abeyance until *Z.J. Gifts* is decided.

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